Koe Swee Hin & Anor v Annakkara Vadakath Ramachandran Menon (suing as a dependant and father to Jayasankar Menon, deceased)

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NOS 12-203 OF 2001 AND 12-201 OF 2001
KAMALANATHAN RATNAM J
2 MAY 2002

Road Traffic *— Negligence — Fatal accident — Collision between motorcycle and motor lorry — No eye-witnesses — Whether plaintiff had proved negligence against the defendants — Whether mere admission by defendants that there was a collision between the two vehicles attached negligence to the defendants*

Tort *— Negligence — Res ipsa loquitur — Collision between motorcycle and motor lorry — No eye-witnesses — Plaintiff relied on res ipsa loquitur — Whether it could be said that in the ordinary course of events the negligence must be that of the first defendant's*

The plaintiff, as the father and dependant of JM ('the deceased'), sued the first defendant as the driver of the motor lorry and the second defendant as the owner of the lorry for negligence. According to the statement of claim, the deceased was travelling in a motorcycle when he was collided into by the first defendant's motor lorry, which was travelling in the same direction. In his police report, the first defendant stated that the deceased overtook his motor lorry from the left and the first defendant felt his left tyre colliding into something. He then stopped the lorry and upon alighting, he found the deceased lying by the roadside. The first defendant admitted that he did not see how the accident occurred but in his evidence in court, he stated that the deceased's motorcycle could have collided into the lamp post. There was no eye-witness to the accident. The sessions court judge allowed the plaintiff's claim. This was the defendants' appeal against that decision.

Held, allowing the defendants' appeal:

(1) The burden was always on the plaintiff to prove his case. At the close of the plaintiff's case, no evidence had been led to support the alleged particulars of negligence. Even after the close of the defendants' case, the plaintiff had failed to prove negligence against the defendants. The mere admission in the defence that there was a collision between the two vehicles did not attach negligence to the defendants (see pp 367A, C, 368A).

(2) The sessions court judge held that the first defendant had contradicted himself when he said that the motorcycle could have collided into the lamp post when the first defendant did not state this in his police report and did not inform his lawyers the same to enable them to plead it. The sessions court judge, in holding that

there was a contradiction, failed to consider the first defendant's evidence that his reason for opining that the motorcycle could have collided into the lamp post was due to the fact that he had only just seen a photograph of the lamp post on the morning when he gave his evidence. Accordingly, there was no basis for the sessions court judge to find the first defendant's evidence inherently improbable (see p 368B–E).

(3) The sessions court judge did not, in her judgment, consider whether she relied on the principle of res ipsa loquitur. In any case, the principle of res ipsa loquitur is no more than a rule of evidence affecting the onus of proof and the essence of the rule is that an event which in the ordinary course of things is more likely than not to have been caused by negligence and that this by itself is evidence of negligence because of an absence of an explanation of the account given by the person accused of negligence. In the instant case, it could not be said that in the ordinary course of events, the negligence must be that of the first defendant's. The deceased could equally have been guilty of grazing into the defendant's lorry (see pp 369H–370A).

[Bahasa Malaysia summary

Plaintif, sebagai bapa dan orang tanggungan JM ('si mati'), telah mendakwa defendan pertama sebagai pemandu lori tersebut dan defendan kedua sebagai tuan punya lori tersebut atas kecuaian. Menurut pernyataan tuntutan, si mati sedang bergerak dengan sebuah motosikal ketika beliau dilanggar oleh lori defendan pertama, yuang sedang bergerak dalam arah yang sama. Di dalam laporan polis beliau, defendan pertama menyatakan bahawa si mati telah memotong lori beliau daripada arah kiri dan defendan pertama terasa tayar kirinya telah terlanggar sesuatu. Beliau kemudiannya memberhentikan lori tersebut dan ketika turun dari lorinya, beliau mendapati si mati terbaring di tepi jalan. Defendan pertama akui bahawa beliau tidak melihat bagaimana kemalangan tersebut telah berlaku tetapi dalam keterangan beliau di mahkamah, beliau menyatakan bahawa motosikal si mati mungkin terlanggar tiang lampu. Tidak terdapat saksi bagi kemalangan tersebut. Hakim mahkamah sesyen telah membenarkan tuntutan plaintif. Ini adalah rayuan defendan-defendan terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan defendan-defendan:

(1) Bebanan adalah selalunya terletak pada plaintif untuk membuktikan kes beliau. Pada penutupan kes plaintif, tiada keterangan telah diberikan untuk menyokong butir-butir kecuaian yang didakwa. Walaupun selepas penutupan kes defendan-defendan, plaintif telah gagal membuktikan kecuaian terhadap defendan-defendan. Pengakuan semata-mata di dalam

pembelaan tersebut bahawa berlakunya pelanggaran antara kedua-dua kenderaan tersebut tidak menunjukkan kecuaian defendan-defendan (lihat ms 367A, C, 368A).

(2) Hakim mahkamah sesyen telah memutuskan bahawa defendan pertama telah menyangkal dirinya sendiri apabila beliau menyatakan bahawa motosikal tersebut mungkin telah terlanggar tiang lampu sedangkan defendan pertama tidak menyatakan perkara ini di dalam laporan polisnya dan tidak memaklumkan peguam-peguam beliau mengenai perkara yang sama bagi membolehkan mereka memplidnya. Hakim mahkamah sesyen, dalam memutuskan bahawa terdapat pertentangan kenyataan, gagal untuk mempertimbangkan keterangan defendan pertama bahawa alasan beliau kerana berfikiran bahawa motosikal itu mungkin telah terlanggar tiang lampu adalah kerana fakta bahawa beliau baru sahaja melihat gambar foto tiang lampu tersebut pada pagi ketika beliau memberikan keterangan. Sehubungan itu, tidak terdapat asas untuk mahkamah sesyen memutuskan keterangan defendan pertama sebagai tidak berkemungkinan sesungguhnya (lihat ms 368B–E).

(3) Hakim mahkamah sesyen telah tidak, di dalam penghakimannya, mempertimbangkan sama ada beliau telah bergantung pada prinsip res ipsa loquitur. Dalam sebarang keadaan, prinsip res ipsa loquitur tidak lebih daripada satu kaedah keterangan yang menjejaskan bebanan membukti dan inti pati kaedah tersebut adalah bahawa sesuatu peristiwa yang mana dalam perjalanan biasa perkara-perkara telah berkemungkinan besar daripada tidak telah disebabkan oleh kecuaian dan bahawa ini dengan sendirinya adalah bukti kecuaian kerana ketiadaan penerangan mengenai peristiwa tersebut yang telah diberikan oleh orang yang dituduh cuai. Di dalam kes semasa, ianya tidak boleh diperkatakan bahawa dalam perjalanan peristiwa biasa, kecuaian tentunya oleh defendan pertama. Si mati mungkin sama bersalah kerana menggesel pada lori defendan (lihat ms 369H–370A).]

Notes

For cases on fatal accident, see 11 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 345–354.

For cases on res ipsa loquitor, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 861–886.

Cases referred to

Johari bin Khalid & Anor v Mohamed Zamri bin Khalid & Anor [1985] 1 MLJ 142 (refd)

Ng Chul Sia v Maimon bte Ali [1983] 1 MLJ 110 (refd)

Jagjit Singh (*Lavenia* with him) (*Jagjit Singh & Co*) for the appellant/defendant.

Baldev Singh (*K Pathmanathan* with him) (*Mawar Nathan & Co*) for the respondent/plaintiff. A

Kamalanathan Ratnam J:

Facts

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The plaintiff/appellant sued, as the father and dependent of Jayasankar Menon ('deceased'), the first defendant as the driver of motorlorry PCM 8552 and the second defendant as the owner of the said lorry.

According to the statement of claim, the deceased was riding his motorcycle PCL 2720 along Jalan Jelutong, on 11 November 1999 at about 2pm and was proceeding from Bukit Dumbar towards Georgetown when the deceased was collided into by the said motorlorry (si mati telah dilanggar oleh motorlori) driven by the first defendant who was proceeding in the same direction. In the particulars of negligence pleaded against the first defendant, the plaintiff contended, inter alia, that the first defendant grazed into the deceased whilst overtaking him. The plaintiff also pleaded res ipsa loquitur. There were no eye-witnesses to the accident. C D

The first defendant lodged a police report the same day at 4.11pm. In that report, he said that as he was driving along Jalan Jelutong the deceased, riding his motorcycle, overtook his lorry from the left. He then felt his left tyre colliding into something. He stopped the lorry and on alighting found the deceased lying by the road side. He then went across to a Caltex Station and called the police. E

The evidence led

The only evidence relied on by the plaintiff was from Insp Muhamad Fazilah, the investigating officer ('the IO'), of the case. He directed 15 photographs of the scene and the vehicles involved to be taken. It is necessary with regret to state that the appeal record contained only photostated copies of these photos. They were of such poor quality that in most of the photographs nothing relevant could be seen. It is the paramount duty of the parties to ensure that the court has before it cogent, readable and perceivable evidence. How is this court to even look at the so-called graze marks that the IO said he found on the right exhaust of the motorcycle and on the left of the lorry? The IO said that he saw scratch marks on the front left rubber of the bumper of the lorry. He also found graze or scratch marks on the left rear tyre of the lorry. He also found scratch marks on the spare tyre of the lorry. One can now see the need for photo prints of the actual photos produced in court, to have been included in the record of appeal to enable this court to consider the relevance of the scratch or graze marks. F G H

Findings of this court

No explanation has been offered as to how scratch marks, and assuming they were fresh scratch marks, having occurred as a result of this accident, could be found at the front left bumper and at the rear left tyre. In other I

A words, assuming there was the initial graze at the front left bumper, then the motor-cycle must have been in motion for the second graze at the rear left tyre. Everything is an assumption. The burden is always on the plaintiff to prove his case. This burden never shifts. This has been best expressed by Hashim Yeop A Sani J (as he then was) in *Ng Chul Sia v Maimon bte Ali* [1983] 1 MLJ 110 at p 111 when he said:

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> When an accidental harm is done, it is not for the doer to excuse himself by proving that the accident was inevitable and that there was no negligence on his part. It is for the person who suffers the harm to prove affirmatively that the accidental harm was due to the negligence of the other person.

C In a negligence action, the onus of proof rests wholly on the plaintiff whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence.

At the close of the plaintiff's case, I found that absolutely no evidence had been led to support the alleged particulars of negligence. The first defendant however, elected to give evidence. He testified that after having D unloaded goods, he was on the left lane as the right lane was heavily congested. His speed at the material time was between 20–30 mph. He then saw a motorcycle coming fast from his rear and on his left. He assumed that the motorcycle must have grazed into a pole/lamp post shown in a photo marked 'J'. Again, this court is unable to identify this pole/lamp post as the photostat copies of the photos are blurred. He then felt his motorlorry E rolling over something. He looked at the rear view mirror and saw something lying on the road. He denied he had attempted to either overtake the motorcycle or to squeeze by the motorcycle.

Under intensive cross-examination, he frankly admitted that he did not see the motorcycle collide into the lamp post but that having seen the F photographs that morning and since there was no impact between his motorlorry and the motorcycle and since the left handle of the motorcycle had a graze mark, he assumed it had grazed into the lamp post. Counsel for the plaintiff attempted to suggest that there was a contradiction in the driver's evidence as given in court when he had said that he only saw the motorcycle after the accident, and whereas in the police report he had said G 'tiba-tiba motorcycle memotong dari arah belakang sebelah kiri saya.' The driver explained the contradiction by saying that the expression 'tiba-tiba' was that of the recording officer and that he was not exactly sure of the meaning. In any case, whilst his report was in Bahasa Malaysia, his evidence in court was in English. When asked how he reconciled the contradiction, he readily admitted that he only saw the motorycle after the accident and H his 'thinking was that the motorcycle must have come from the rear.'

I do not think much can be made of the defendant's suggestion that the motorcycle might have collided into the lamp post and then fallen into his path. The truth of the matter is, he never saw how the accident occurred. His evidence that he only felt going over something remained unchallenged. I Whilst there is some evidence of graze marks on the lorry and on the motorcycle, there is no evidence that these scratch or graze marks were fresh marks arising out of this accident, and even assuming they were as a result

of this accident, there is no evidence that it was the motorlorry that grazed into the motorcycle. In other words, even after the close of the defence case, the plaintiff had failed to prove negligence against the defendant. Merely admitting in the defence that there was a collision between the two vehicles does not attach negligence to the defendants. The first defendant gave his evidence and I find that the plaintiff had made no inroads in establishing the defendants' negligence.

In her judgment, the learned sessions court judge made a finding that the plaintiff himself did not know how the accident had occurred. She also held that the only evidence the plaintiff had relied on was that of the first defendant. She however held that the first defendant had contradicted himself when he said that the motorcycle could have collided into the lamp post when he neither mentioned this when he lodged his police report nor when he gave a statement to his solicitors when they drafted the defence. The learned sessions court judge, however, in holding that there was a contradiction, failed to consider the evidence of the first defendant that the reason he had opined that the motorcycle had collided into the lamp post was because only that morning when he gave his evidence, had he seen the police photograph showing the lamp post by the road edge and since the IO had also that day given evidence that the left handle of the motorcycle had grazed into something, he assumed that the motorcycle must have grazed into the lamp post which was on the left. The left handle of the motorcycle could not have grazed into the left of the lorry if both vehicles were in motion. Herein lies the error of the learned sessions court judge and her wrong conclusion that the first defendant's evidence was inherently improbable. Although in her oral decision made on the day of the hearing, that is on 28 November 2000, she found the first defendant's evidence inherently improbable yet in her written judgment delivered on 20 June 2001, she made no reference to such a finding.

This court is left with two decisions on liability arrived at by the learned sessions court judge. In one, she finds the defendants' version inherently improbable. In the full written judgment she finds that the plaintiff had 'lebih dari berjaya membuktikan bahawa defendan harus bertanggungan seratus peratus dalam kemalangan maut ini.' I do not think it is proper for the defendants to be put in such a state of flux. They must know whether the case against them is that their story is inherently improbable or whether the plaintiff had succeeded in proving, from the evidence of the defendant, his case.

The question of 'inherent improbability' arose in *Johari bin Khalid & Anor v Mohamed Zamri bin Khalid & Anor* [1985] 1 MLJ 142 (FC). The pillion rider of a motorcycle whose rider died in the accident testified that they with two other motorcycles were proceeding from the direction of Temerloh towards Triang at about 12.30pm. They saw what appeared to be a police road block consisting of a police landrover and two motorcycles. All the three government vehicles were parked and stationary in one line across the road in such a way that there was hardly any space left for the deceased's motorcycle which was then approaching, to pass through. The deceased's motorcycle then collided into one of the motorcycles in their

convoy, and thereafter collided into one of the government motorcycles manning the road block. The defendants disputed this version. The first defendant whose motorcycle the deceased's motorcycle had allegedly collided into, denied that there was a road block at the material time and place. According to the first defendant, who produced other police witnesses to corroborate his evidence, eight police constables headed by a police inspector, after finishing their roadblock duties, were all travelling in a single file, each at a distance of 40–60ft to one another with the first defendant's motorcycle being in a second position from the inspector's landrover and two other motorcycles behind him. As they were approaching the scene of the accident, the first defendant said he saw the deceased's motorcycle following another motorcycle from the opposite direction. The deceased's motorcycle knocked into the rear of the civilian motorcycle and then knocked into his, the first appellant's motorcycle. The Federal Court held that the foundation of the defendants' version was that the police party was on the move and not stationary as claimed by the first plaintiff and that there was no road block at the material time. There was even an independent witness who testified that he was overtaken by the police vehicles travelling in the same direction and that ten minutes later he had arrived at the scene of the accident. The Federal Court held that the learned trial judge had given no reason for refusing to accept the evidence of the independent witness. Further, the Federal Court went on to hold that the learned trial judge had given no consideration to the improbability of the police party setting up a road block within ten minutes that had elapsed between the time the police party overtook the independent witness and the time when that witness arrived at the scene of the accident. The Federal Court in reversing the decision of the trial judge held that the first plaintiff's evidence was inherently improbable. The contradiction that the trial judge had alluded to in the evidence of the first defendant merely referred to whether the accident was caused by the deceased's motorcycle knocking into the civilian motorcycle first before it finally collided into the first defendant's motorcycle or whether it knocked into the first defendant's motorcycle straightaway.

To my mind, this is an instance of a story being inherently improbable. It rested on whether there was or was not a road block.

In the case before me, there was no basis for the learned sessions court judge to find that the first defendant's story that he did not see the accident and that he only assumed that the left handle of the deceased's motorcycle had grazed the lamp post was inherently improbable just because he did not either state that in the police report or inform his lawyers to enable them to plead it.

The plaintiff admitted that he relied heavily on res ipsa loqitur. Unfortunately, the learned sessions court judge did not in her judgment, consider whether she relied on this principle. In any case, the principle of res ipsa loquitur is no more than a rule of evidence affecting the onus of proof and the essence of the rule is that an event which in the ordinary course of things is more likely than not to have been caused by negligence and that this by itself is evidence of negligence because of an absence of an

explanation of the account given by the person accused of negligence. But in this case, can it be said that in the ordinary course of events the negligence must be that of the first defendant? Could not the deceased have been equally guilty of grazing into the defendant's lorry? After all, the evidence remains unchallenged that the deceased was proceeding from the first defendant's rear and into the path on the left of the defendant's lorry.

Having heard arguments from both parties I allowed the defendants' appeal and set aside the judgment of the sessions court. I, therefore, dismissed the plaintiff's claim with costs.

As for the plaintiff's appeal against the award of damages, I was of the view that the sessions court judge did not err in the award she made. Hence, I found no need to consider both appeals against quantum.

Defendant's appeal allowed.

Reported by Lim Lee Na